SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1914

FURNESS, WITHY & COMPANY, LIMITED,
(Respondent-Appellant),
Petitioner,

AGAINST

YANG-TSZE INSURANCE ASSOCIATION,
LIMITED, *et al.*
(Libellants-Appellees),
Respondents,

And 14 other Suits

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Furness, Withy & Company, Limited, respectfully shows as follows:

This is a renewal of an application for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit. On April 12, 1915, your petitioner presented its petition for the writ under docket No. 921, October Term, 1914, which petition was denied April 19, 1915.

On May 10, 1915, as your petitioner is informed, this Court granted a writ of *certiorari* to the Circuit Court of Appeals for the Ninth Circuit upon the petition of Olaf Lie, master of the Norwegian steamship *Selja*, in a suit between said Olaf Lie, master, etc., and the San Francisco & Portland Steamship Company, etc., said petition being docketed in this Court as No. 928, October Term, 1914.

Your petitioner now renews its application for *certiorari* for the reason that the questions presented by its

petition are identical with those presented by the petition of Olaf Lie. The principal question is whether under this Court's decision in *The Pennsylvania*, 19 Wall. 125, a privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie*, at least) of Article 21 of the International Regulations may be held responsible for the collision, notwithstanding that it appears as matter of law that the porting was no part of the cause of the collision, and notwithstanding also that the manifest and primary cause of the collision was the gross and unparalleled negligence of the burdened vessel in failing to keep any lookout whatever in the direction of the privileged vessel and not seeing her until collision was unavoidable.

In support of this application your petitioner begs leave to refer to its petition and brief on its original application to this Court, as well as to the petition of said Olaf Lie and the brief in support thereof.

The facts appear at page 3 of your petitioner's original petition. At pages 6 and 7 the questions presented for the consideration of this Court are stated as follows:

"1. Under the rule of *The Pennsylvania*, 19 Wallace, 125, is it sufficient for a vessel charged with a statutory violation to show that the fault did not contribute to the disaster, or must she also show that it could not have done so?

2. Does the burden rest upon a vessel charged with a statutory violation to show that the disaster would have occurred irrespective of any action or inaction on her part?

3. Is it necessary to show that the statutory violation contributed to the disaster, or may the "but for" rule be relied upon to establish liability?

4. Is the rule that in case of gross fault on the part of one vessel any doubts regarding the management of the other vessel or the contribution of her faults, if any, to the collision should be resolved in her favor, inapplicable where the fault charged is a statutory violation?

5. Is the privileged vessel justified in changing her course when there is a distinct indication that the burdened vessel is about to fail in her duty?"

At pages 1 and 2 of the brief in support of the petition of Olaf Lie the question is thus stated:

"The main question for decision is this: If a vessel's reckless and immoderate speed in a dense fog is an admitted fault, and one clearly and indisputably the proximate cause of a collision; can the other vessel, whose fault clearly and indisputably was *not* the proximate cause of the collision, but only a cause *sine qua non*, be also held as a contributor under any proper construction of the '*Pennsylvania Rule*,' or under any other legal or equitable principle of maritime law?"

In their essence the questions in the two cases are thus seen to be the same. In the Olaf Lie case the *Selja* was held to a divided liability for the collision with the *Beaver* because she did not stop her engines sooner after she heard the *Beaver's* whistle in the fog. The *Pomaron* was held liable for the collision with the *Alleghany* because she ported her helm before the collision in order to avoid collision, which then seemed to be inevitable if she did not.

At page 4 of the brief in support of the petition of Olaf Lie it is said:

"As a rule of causation the rule is seen to be a distinct exception to the general rule of proximate cause, but it is clearly made applicable only to such class of cases as show an actual violation effective '*at the time of the collision.*' In all other cases, of course, '*the liability for damage is upon the ship or ships whose fault caused the injury,*' as may be shown through the application of the established and known common law principle of proximate cause."

Like the *Selja*, the *Pomaron* was not violating a statutory rule "at the time of the collision." As your petitioner pointed out at page 7 of its brief, the *Pomaron's* porting did not influence the *Alleghany's* navigation, and the case should therefore have been considered as if the

Pomaron had always been and remained on the course on which her porting placed her.

The importance of the questions involved from the point of view of navigation and commerce, as well as from that of uniformity of decision, was sufficiently dwelt upon in the original petition. If upon the hearing of the writ in the Olaf Lie case this Court should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit, your petitioner conceives that it would likewise be entitled to a reversal of the decision of the Circuit Court of Appeals for the Second Circuit in this case, and that its failure to secure such a reversal would amount to a serious denial of justice. Upon the original application your petitioner did not direct the attention of the Court to the fact that a petition for *certiorari* was to be presented in the Olaf Lie case. The case of the *Pomaron* is in all important aspects so nearly identical with that of the *Selja* that this Court might well in its discretion hear argument on both cases at the same time without any confusion of the issues. The record, which was presented to this Court on the original application, is not voluminous, being of only 300 pages.

Subsequent to the decision of the Circuit Court of Appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this Court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the Clerk of the District Court. As these payments were made under compulsion they would be recoverable by your petitioner in the event that this court should reverse the decision of the Circuit Court of Appeals.

WHEREFORE your petitioner prays that this Honorable Court will cause a writ of *certiorari* to issue requiring the United States Circuit Court of Appeals for the Second

Circuit to certify the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioner will ever pray.

FURNESS, WITHY & COMPANY, LIMITED,
By BURLINGHAM, MONTGOMERY & BEECHER,
its proctors.

STATE OF NEW YORK,
County of New York, } ss:

EVERETT MASTEN, being duly sworn, deposes and says that he is one of the proctors for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief; that the reason why this verification is not made by the petitioner is that the petitioner is not within this District, and deponent is its proctor and familiar with the facts stated in the petition.

EVERETT MASTEN.

Sworn to before me, this
15th day of May, 1915.

ROSCOE H. HUPPER,
[SEAL] Notary Public,
New York Co., No. 1621.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

Dated, New York, May 17, 1915.

CHARLES C. BURLINGHAM.

SIRS:

TAKE NOTICE that the foregoing petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Tuesday, June 1st, 1915.

Dated New York, May 17, 1915.

BURLINGHAM, MONTGOMERY AND BEECHER,
Proctors for Petitioner.

To

MESSRS. CONVERS & KIRLIN,
Proctors for Yang-Tsze Insurance Association, Ltd., *et al.*, and Nord-Deutsche Insurance Co., *et al.*

MESSRS. KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co., *et al.*

MESSRS. BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, *et al.*; M. H. Silvera & Hazan & Co.

MESSRS. WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

MESSRS. HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Francis W. Van Praag, Orton G. Orr, Laura Moore and Louis Bertschmann.

H. SNOWDEN MARSHALL, ESQ.,
Proctor for United States of America.